

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1395

To be argued by
SARAH S. GOLD

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1395

UNITED STATES OF AMERICA,

Appellee,

—v.—

VINCENT ANGELINA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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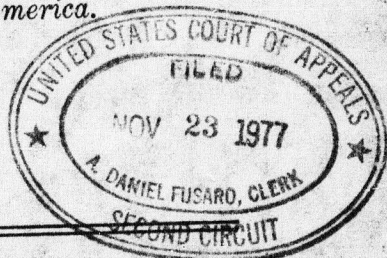


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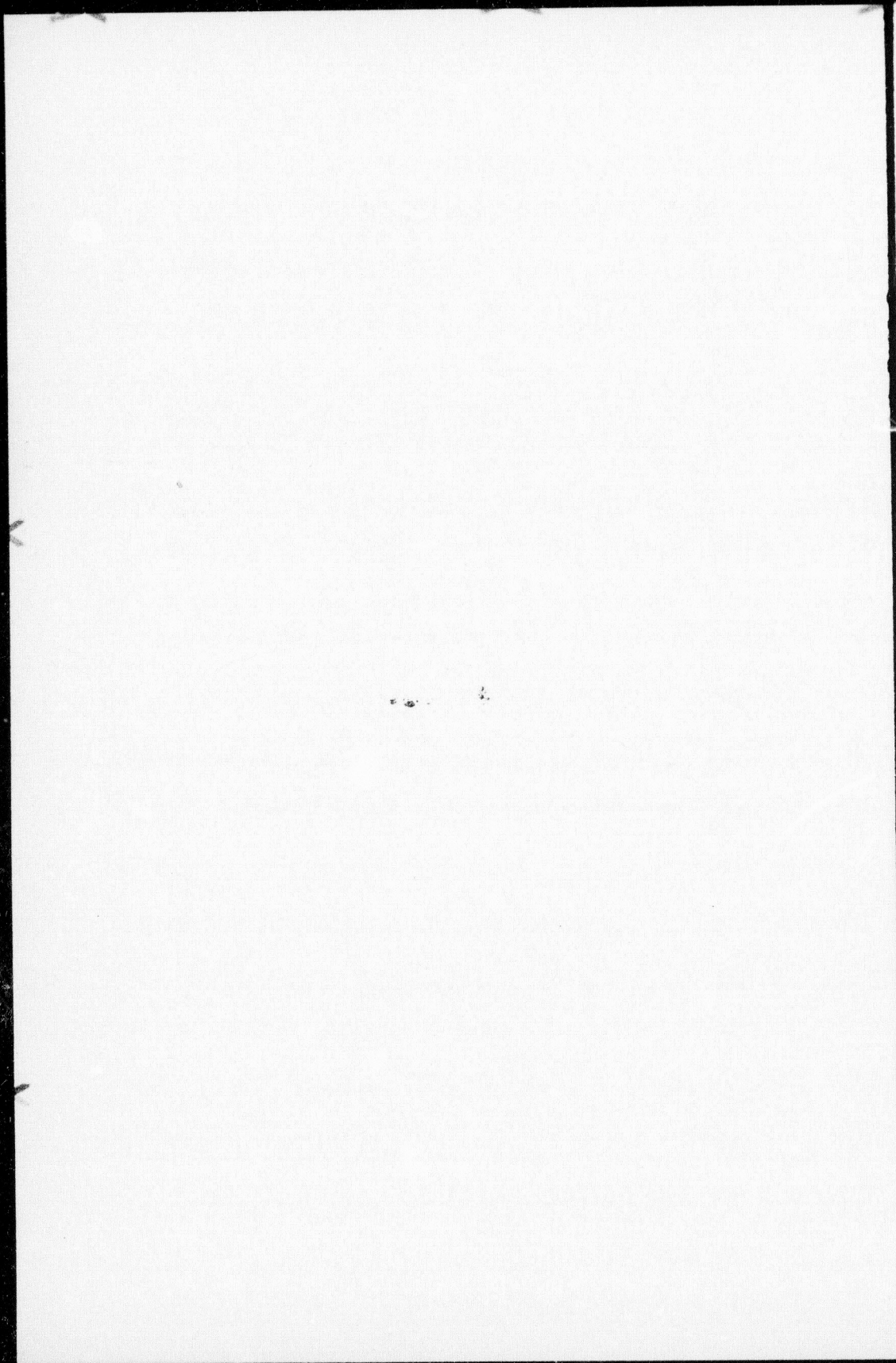
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Preliminary Statement

Vincent Angelina appeals from an order filed in the United States District Court for the Southern District of New York on August 8, 1977 by the Honorable Thomas P. Griesa, United States District Judge, denying Angelina's motion to withdraw his guilty plea and to vacate his conviction on the ground that the Government violated an alleged plea agreement.

On April 5, 1977 Indictment S 77 Cr. 40 was filed charging the defendant Angelina with two counts of distributing Lysergic acid diethylamide (LSD), and other controlled drugs in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B) and with a conspiracy to commit these offenses in violation of Title 21, United States Code, Section 846.

The defendant originally pleaded not guilty to this indictment on May 6, 1977, and trial was set for June 6,

1977. On the morning of trial, the defendant Angelina entered a guilty plea to Count Three, distribution of a large quantity of Lysergic Acid Diethylamide (LSD). On July 22, 1977, Angelina was sentenced to one year imprisonment on Count Three and two years special parole. Pursuant to an agreement between Angelina and the Government, Counts One and Two were dismissed.

On June 7, 1977 the day after he pleaded guilty Angelina moved to withdraw his guilty plea, and on July 15, 1977 after conducting a conference Judge Griesa denied the motion. At the time sentence was imposed, Angelina again moved to vacate his guilty plea, and that motion was again denied. No appeal was taken from these two motions to withdraw the guilty plea. Following the July 22, 1977 sentence Angelina moved to modify his sentence, and on July 29, 1977 that motion was denied.

Finally, on August 2, 1977 Angelina filed the instant motion to vacate his guilty plea. Judge Griesa denied that motion on August 4, 1977. Angelina's motion for bail pending appeal of the denial of the motion to vacate the guilty plea was denied by the District Court. The District Court's denial of bail on the grounds that the appeal was frivolous and taken for the purpose of delay was affirmed by this Court.

Statement of Facts

On June 6, 1977 Angelina pleaded guilty to Count Three of Indictment S 77 Cr. 40. After asking the defendant whether he was acting on his own free will, Judge Griesa specifically asked Angelina if there were any agreements between him and the Government other than the understanding that the Government will not oppose the dismissal of Counts One and Two at the time

of sentence. Both Angelina and his counsel stated that no other agreements existed. (App. 11-12).^{*} Judge Griesa in great detail explained to Angelina the rights he was waiving by pleading guilty, and made certain that Angelina understood those rights. The District Court informed Angelina that the maximum penalty was five years in prison and a \$5,000 fine, and that the exact sentence was for the Court to decide and that no commitment or promise relating to sentence could be made. (App. 13-14). Thereafter, Judge Griesa examined Angelina to determine that there was a factual basis for the plea. (App. 15-16).

Defendant Angelina's first motion to vacate his guilty plea was made on June 7, 1977, the day following entry of his guilty plea. The ground asserted at that time was that the defendant's guilty plea was the result of pressure by friends and "the aura of the Court." (See Affidavit of Enid Gerling, Esq., dated June 7, 1977). The Government opposed that motion on the grounds that the guilty plea 1) had comported with all the requirements of Rule 11, Federal Rules of Criminal Procedure; 2) had included a careful allocution with respect to its voluntariness; and 3) had obviously been entered upon full consideration of the strength of the government's case as revealed in the discovery materials furnished to the defense.^{**}

^{*} The designation "App." refers to pages in the appellant's appendix.

^{**} "[Defense counsel] was aware that her client, Angelina, had given a full confession to the crimes set forth in the indictment [as to which no motion to suppress had been made], that the government had in its possession many hours of taped conversations between Angelina and an informant of the D.E.A. in which Angelina arranges the sales charged and makes many incriminating statements. She was further aware that the sales by Angelina, as charged in the indictment, were made in the presence of undercover agents of the D.E.A." (See affidavit of Assistant United States Attorney Gold, paragraph 5, filed on July 7, 1977).

In view of the motion to withdraw the guilty plea Judge Griesa held a conference. At the conference on July 15, 1977, Judge Griesa asked Angelina about his guilty plea. Angelina conceded that he was not coerced into pleading guilty, but rather was upset about the possibility of losing his beautician's license.

The following colloquy occurred:

THE COURT: You state your position Mr. Angelina.

THE DEFENDANT: Well, Your Honor, like I am trying to explain, if I am given hopefully probation on the case, if I were, I would still be convicted of a felony and thereby I lose my license. If I lose my license, I will be a welfare recipient because it puts me out of work, puts several other people out of work, and I just have no other means of employment. This is my only vocation. This is the only thing I know.

THE COURT: The question is were you guilty of that offense. You admitted guilt at that hearing.

THE DEFENDANT: That's right, I did.

* * * * *

THE COURT: . . . there wasn't any coercion to get you to plead guilty?

THE DEFENDANT: No, sir, no.

THE COURT: You knew what you were doing?

THE DEFENDANT: Yes, sir.

Thus, Judge Griesa denied the motion to withdraw the guilty plea, and no appeal was taken. (See Transcript, July 15, 1977 conference at 2-4).

Prior to the time of sentence on July 22, 1977, the District Court had received a letter from the defendant. This letter was not served upon the United States Attorney's Office. Judge Griesa referred to the defendant's letter and his desire to vacate his guilty plea. The District Court explained its unwillingness to permit the withdrawal of a voluntary and otherwise properly entered guilty plea. (App. 26).

During the sentence proceeding, Angelina's attorney claimed that certain information in the presentence report which had been provided to the Probation Department by an Assistant United States Attorney was erroneous. Judge Griesa made it quite clear that he was not considering that information. At no time did Angelina or counsel contend that the Government had violated any plea agreement by giving that information to the Probation Department. (App. 23-24).

At the time of sentence and at the request of counsel for the defendant, the date of surrender was adjourned until August 12, 1977. On July 28, 1977, Angelina filed a motion to modify the sentence. That motion was denied on July 29, 1977. Thereafter, on August 2, 1977 a further motion to set aside the guilty plea and the sentence was made. That motion which is the subject of the instant appeal was denied by the District Court on August 4, 1977.

On October 17, 1977 Judge Griesa denied Angelina's motion for bail pending appeal of his post sentence motion to withdraw the guilty plea finding that the appeal was frivolous and taken for purposes of delay. Angelina was directed to surrender on October 20, 1977. On October 25, 1977 this Court affirmed the District Court's decision denying bail on the grounds that the appeal was frivolous and taken for the purpose of delay. Angelina is currently serving his sentence.

ARGUMENT

The Government Did Not Violate Any Plea Agreement With Angelina.

Angelina contends that the Government violated a plea agreement not to make any sentencing recommendation. He specifically argues that supplying certain information to the Probation Department constituted a violation of the plea agreement, and this alleged breach of the plea agreement requires vacating the defendant's guilty plea. Since no such agreement existed, Angelina's claim is without merit.

Since this particular motion to withdraw the guilty plea was made after the imposition of sentence, there is no ground to permit the withdrawal of the guilty plea unless the District Court had determined that such withdrawal was necessary "to correct manifest injustice." F. R. Crim. P. 32(d). Indeed even if this were construed as a motion made prior to sentence to withdraw a guilty plea, defendant has failed to show any valid grounds to justify vacating the plea or that the District Court's refusal to permit the withdrawal was clearly erroneous. *United States v. Michaelson*, 552 F.2d 472, 475 (2d Cir. 1977); *United States v. Lombardozzi*, 436 F.2d 878, 881 (2d Cir.), *cert. denied*, 402 U.S. 908 (1971); *United States v. Fernandez*, 428 F.2d 578, 580 (2d Cir. 1970). Angelina's motion based on a totally false assumption—that the Government violated a plea agreement—does not raise any serious constitutional claim or state any ground to support withdrawal of the guilty plea.

The record is devoid of any evidence that any plea agreement relating to the Government's position at the time of Angelina's sentence implicitly or explicitly existed. On June 6, 1977 at the time Angelina pleaded

guilty, all the parties—counsel for the government, the defendant Angelina and defense counsel, Ms. Gerling—made clear the full extent of any understandings between the government and Angelina. The following colloquy occurred at the time:

MS. GERLING: The defendant wishes to withdraw his plea of not guilty and enter a plea under the Third Cuont of the indictment to cover the indictment. This is your honor, the sale of the LS.D

THE COURT: What does the Government say to the plea on the Third Count?

MISS GOLD: We told the defendant, Your Honor, at the time of sentencing we would not oppose a motion to dismiss Counts 1 and 2.

* * * * *

THE COURT: Are there any agreements between you and the Government?

THE DEFENDANT: No, Sir.

THE COURT: Except that the Government will not oppose dropping Counts 1 and 2 at the time of sentence. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: There are not other agreements?

THE DEFENDANT: No.

THE COURT: Is that correct?

MS. GERLING: Yes. (App. 11-12).

Thus it is clear from the plea minutes that the only plea agreement between the parties was an agreement not to oppose dismissal of the outstanding counts at the time of sentence. The defendant has offered no explana-

tion for the failure to inform the District Court about this alleged agreement at the time the guilty plea was accepted.

In the first motion by defendant to set aside his guilty plea, Ms. Gerling in her affidavit reaffirmed the absence of any such plea agreement. In that affidavit, Ms. Gerling stated that the Government had offered the defendant a plea of guilty to one count of the indictment and dismissal of the other two counts. On the day of trial, Ms. Gerling continued, the defendant decided to accept the government's offer and further that the Assistant United States Attorney "made no promises and used no duress but only offered the plea as taken."

It is further clear from the sentencing minutes that no such plea agreement as now alleged existed. On appeal, the defendant Angelina makes the following assertion: "Enid Gerling who represented Mr. Angelina throughout the period of negotiations first raised the spectre that the plea bargain was breached at the time of Mr. Angelina's sentencing." (Appellant's Br. 4). The record is to the contrary. The sentencing minutes, devoid of any assertion by counsel of such a plea agreement, reflect the fact that no such agreement ever existed. In fact, Ms. Gerling objected to information in the presentence report concerning the defendant's participation in the crimes charged but only on the grounds that the statements were "unsubstantiated" and "prejudicial."*

* It is also clear that Judge Griesa did not even consider the information objected to by Angelina. At the time of sentence, when Ms. Gerling objected to information provided by the Government to the Probation Office as prejudicial, the following colloquy occurred.

MS. GERLING: . . . I don't believe any weight should be given to it.

THE COURT It will not, the thing is that he has pleaded to a particular crime and that's the crime

[Footnote continued on following page]

Neither defense counsel nor the defendant intimated that the conveying of this information to the Probation Department or to the Court violated any expressed or implied agreement with the Government.

On July 28, 1977, after the sentence, Ms. Gerling filed a motion to modify Angelina's sentence. Notably absent from defense counsel's affidavit is any mention of the plea agreement now claimed to have existed. The motion was denied by the District Court on July 29, 1977. Thus, it was only after the defendant received a sentence of one year's imprisonment and modification of that sentence was denied by the District Court that the defendant filed "a motion to set aside the plea of guilty and the sentence on the additional grounds [sic]" that the Government had violated the plea agreement by providing the Probation Department with certain information. That allegation stood unsupported and in total contradiction to every prior statement of the parties in the record. It is clear that no such plea agreement existed.

Moreover, even if an agreement not to take a position on Angelina's sentence ever existed, that agreement was surely not violated.** Neither at the time of sentence nor at any other time did the Government in this case make any sentencing recommendation.

Angelina contends that the alleged agreement to make no sentencing recommendation was breached when the

I am considering.

... I will say on both sides that I cannot consider for sentencing evidence that I don't have. I will just not consider tapes that I haven't heard and so forth. (App. 23-24).

** Defendant's reliance on *Santobello v. New York*, 404 U.S. 257 (1971), detailing remedies for breach of a plea bargain, is wholly misplaced since there was neither an agreement nor breach of an agreement in this case.

Government gave information concerning the defendant's participation in the crimes charged to the Probation Office. However, an agreement to make no recommendation as to sentence is not an implied agreement not to furnish information to the Probation Office.

In *United States v. Michaelson*, 522 F.2d 472 (2d Cir. 1977) this Court rejected the very claim advanced by Angelina. In *Michaelson* the defendant argued that by providing the Probation Office with information as to each defendant's part in the conspiracy, the Government had violated its promise not to make a sentencing recommendation. This Court explicitly held that this conduct did not constitute a violation of any agreement; rather the Court observed that the "Government had a duty to transmit such facts" to the Probation Office, citing *United States v. Needles*, 472 F.2d 652, 654-55 (2d Cir. 1973), and that "the argument that it impliedly agreed not to is frivolous." *United States v. Michaelson*, *supra*, 522 F.2d at 475.

Consequently any claim that in meeting its obligations to the Court by providing the Probation Department with relevant information the Government violated a plea agreement with Angelina must fail. In addition, the record reflects the allegation that such an agreement ever existed was a mere afterthought made by the defendant only after he received a prison sentence.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

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County of New York)

SS.:

SARAH SCHRANK GOLD, being duly sworn,
deposes and says that She is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 23rd day of November, 1977
She served ~~two~~ copies of the within brief
by placing the same in a properly postpaid franked
envelope addressed:

Mel Sachs, Esq.
100 Church Street
NYC NY 10007

And deponent further says that She sealed the said
envelope and placed the same in the mail box for mailing
at One St. Andrew's Plaza, Borough of Manhattan, City of
New York.

Sarah Schrank Gold

Sworn to before me this

23rd day of November, 1977
Maria A. Israelian.

MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978

